

the alien a Final Administrative Removal Order that states the reasons for the decision of deportability.

(iii) *Conversion to proceedings under section 240 of the Act.* If the deciding Service officer finds that the alien is not amenable to removal under section 238 of the Act, the deciding Service officer shall terminate the expedited proceedings under section 238 of the Act and shall, where appropriate, cause to be issued a notice to appear for the purpose of initiating removal proceedings before an immigration judge under section 240 of the Act.

(3) *Termination of proceedings by deciding Service officer.* Only the deciding Service officer may terminate proceedings under section 238 of the Act, in accordance with this section.

(e) *Proceedings commenced under section 240 of the Act.* In any proceeding commenced under section 240 of the Act which is based on deportability under section 237 of the Act, if it appears that the respondent alien is subject to removal pursuant to section 238 of the Act, the immigration judge may, upon the Service's request, terminate the case and, upon such termination, the Service may commence administrative proceedings under section 238 of the Act. However, in the absence of any such request, the immigration judge shall complete the proceeding commenced under section 240 of the Act.

(f) *Executing final removal order of deciding Service officer—(1) Time of execution.* Upon the issuance of a Final Administrative Removal Order, the Service shall issue a Warrant of Removal in accordance with §1241.2 of this chapter; such warrant shall be executed no sooner than 14 calendar days after the date the Final Administrative Removal Order is issued, unless the alien knowingly, voluntarily, and in writing waives the 14-day period.

(2) *Country to which alien is to be removed.* The deciding Service officer shall designate the country of removal in the manner prescribed by section 241 of the Act.

(3) *Withholding of removal.* If the alien has requested withholding of removal under §1208.16 of this chapter, the deciding officer shall, upon issuance of a Final Administrative Removal Order, immediately refer the alien's case to

an asylum officer to conduct a reasonable fear determination in accordance with §1208.31 of this chapter.

(g) *Arrest and detention.* At the time of issuance of a Notice of Intent or at any time thereafter and up to the time the alien becomes the subject of a Warrant of Removal, the alien may be arrested and taken into custody under the authority of a Warrant of Arrest issued by an officer listed in §287.5(e)(2) of 8 CFR chapter I. The decision of the Service concerning custody or bond shall not be administratively appealable during proceedings initiated under section 238 of the Act and this part.

(h) *Record of proceeding.* The Service shall maintain a record of proceeding for judicial review of the Final Administrative Removal Order sought by any petition for review. The record of proceeding shall include, but not necessarily be limited to: the charging document (Notice of Intent); the Final Administrative Removal Order (including any supplemental memorandum of decision); the alien's response, if any; all evidence in support of the charge; and any admissible evidence, briefs, or documents submitted by either party respecting deportability. The executed duplicate of the Notice of Intent in the record of proceedings shall be retained as evidence that the individual upon whom the notice for the proceeding was served was, in fact, the alien named in the notice.

[62 FR 10365, Mar. 6, 1997, as amended at 64 FR 8494, Feb. 19, 1999; 67 FR 39258, June 7, 2002. Duplicated from §238.1 at 68 FR 9838, Feb. 28, 2003, as amended at 68 FR 10355, Mar. 3, 2003]

## PART 1239—INITIATION OF REMOVAL PROCEEDINGS

### Sec.

1239.1 Notice to appear.

1239.2 Cancellation of notice to appear.

1239.3 Effect of filing notice to appear.

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SOURCE: 62 FR 10366, Mar. 6, 1997, unless otherwise noted. Duplicated from part 239 at 68 FR 9838, Feb. 28, 2003.

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**§ 1239.1 Notice to appear.**

(a) *Commencement.* Every removal proceeding conducted under section 240 of the Act (8 U.S.C. 1229a) to determine the deportability or inadmissibility of an alien is commenced by the filing of a notice to appear with the immigration court. For provisions relating to the issuance of a notice to appear by an immigration officer, or supervisor thereof, see 8 CFR 239.1(a).

(b) *Service of notice to appear.* Service of the notice to appear shall be in accordance with section 239 of the Act.

[62 FR 10366, Mar. 6, 1997, as amended at 67 FR 39258, June 7, 2002; 69 FR 44907, July 28, 2004]

**§ 1239.2 Cancellation of notice to appear.**

(a) *Prior to commencement of proceedings.* For provisions relating to the authority of an immigration officer to cancel a notice to appear prior to the vesting of jurisdiction with the immigration judge, see 8 CFR 239.2(a) and (b).

(b) [Reserved]

(c) *Motion to dismiss.* After commencement of proceedings pursuant to 8 CFR 1003.14, government counsel or an officer enumerated in 8 CFR 239.1(a) may move for dismissal of the matter on the grounds set out under 8 CFR 239.2(a). Dismissal of the matter shall be without prejudice to the alien or the Department of Homeland Security.

(d) *Motion for remand.* After commencement of the hearing, government counsel or an officer enumerated in 8 CFR 239.1(a) may move for remand of the matter to the Department of Homeland Security on the ground that the foreign relations of the United States are involved and require further consideration. Remand of the matter shall be without prejudice to the alien or the Department of Homeland Security.

(e) *Warrant of arrest.* When a notice to appear is canceled or proceedings are terminated under this section any outstanding warrant of arrest is canceled.

(f) *Termination of removal proceedings by immigration judge.* An immigration judge may terminate removal proceedings to permit the alien to proceed to a final hearing on a pending application or petition for naturalization

when the alien has established prima facie eligibility for naturalization and the matter involves exceptionally appealing or humanitarian factors; in every other case, the removal hearing shall be completed as promptly as possible notwithstanding the pendency of an application for naturalization during any state of the proceedings.

[62 FR 10366, Mar. 6, 1997. Duplicated from part 239 at 68 FR 9838, Feb. 28, 2003, as amended at 69 FR 44907, July 28, 2004]

**§ 1239.3 Effect of filing notice to appear.**

The filing of a notice to appear shall have no effect in determining periods of unlawful presence as defined in section 212(a)(9)(B) of the Act.

**PART 1240—PROCEEDINGS TO DETERMINE REMOVABILITY OF ALIENS IN THE UNITED STATES****Subpart A—Removal Proceedings**

Sec.

1240.1 Immigration judges.

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1240.16 Application of new procedures or termination of proceedings in old proceedings pursuant to section 309(c) of Public Law 104-208.

1240.17–1240.19 [Reserved]

**Subpart B—Cancellation of Removal**

1240.20 Cancellation of removal and adjustment of status under section 240A of the Act.

1240.21 Suspension of deportation and adjustment of status under section 244(a) of the Act (as in effect before April 1, 1997) and cancellation of removal and adjustment of status under section 240A(b) of the Act for certain nonpermanent residents.